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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ISABELLE CRAIG, sole heir-at-law and successor in interest to CARL M. WORTH, and SHELL OIL COMPANY, a Delaware corporation,

Appellants,

v.

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, TOTAL LEONARD, INC., THE DOW CHEMICAL COMPANY, SAXON OIL COMPANY, JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, and DELORES M. COOK d/b/a SOUTHWESTERN OIL COMPANY,

Appellees.

On Appeal From The Supreme Court Of Michigan

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

May the State of Michigan, consistent with the due process clause of the Fourteenth Amendment, divest one person of title to an oil and gas interest in real estate and give it to another, without providing notice, an opportunity to be heard or compensation to the person from whom the property has been taken?

PARTIES TO PROCEEDINGS BELOW

By order of the Michigan Supreme Court, this case, styled *Bickel* v. *Fairchild* below, and a second case raising similar issues (*Van Slooten* v. *Larsen et al.*, No. 62256, Michigan Supreme Court) were briefed and heard together. With the exceptions of Carl M. and Doris W. Worth,* all of the parties to the *Bickel* appeal below are listed in the caption of the appeal to this Court.**

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* Both are deceased. Their interest has passed to appellant Isabelle Craig.

** Shell Oil Company, the sole corporation by whom this Jurisdictional Statement is filed, is a Delaware corporation. Approximately 69 percent of Shell Oil Company's outstanding shares of common stock is owned of record or beneficially by Shell Petroleum, N.V., a Netherlands company. The voting shares of Shell Petroleum, N.V., are owned 60 percent by Royal Dutch Petroleum Company, the Hague, Netherlands, and 40 percent by The "Shell" Transport and Trading Company, Ltd., London, England. No affiliate or subsidiary of Shell Oil Company has any interest, financial or otherwise, in the outcome of proceedings in this Court.

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Appellees.

On Appeal From The Supreme Court Of Michigan

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Michigan Supreme Court is reported at 410 Mich. 21, 299 N.W.2d 704 (1980), and is reprinted at Appendix A. The opinion of the Michigan Court of Appeals is reported at 83 Mich. App. 467, 268 N.W.2d 881 (1978), and is reprinted at Appendix B. The Michigan Circuit Court's opinion, which is reprinted at Appendix C, is unreported.

JURISDICTION

The proceedings below were commenced by appellees in Michigan Circuit Court to quiet title to certain oil and gas properties. Appellants defended by challenging the constitutionality of the statute under which appellees claimed title to the property in question. The trial court ruled that the statute, Michigan's Dormant Mineral Act, is unconstitutional. The Court of Appeals affirmed.

On December 23, 1980, the Michigan Supreme Court entered final judgment reversing the Court of Appeals and upheld the Michigan statute against challenges based upon the Michigan and United States Constitutions. Notices of appeal were filed by mail on February 24, 1981, and March 12, 1981, in the Michigan Supreme Court. Jurisdiction over this appeal from the Michigan Supreme Court's judgment is conferred by 28 U.S.C. § 1257(2).

Because this appeal draws into question the constitutionality of Michigan's Dormant Mineral Act, 28 U.S.C. § 2403(b) may be applicable. Accordingly, a copy of this jurisdictional statement is being served upon Michigan's Attorney General.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. **United States Constitution, Amendment XIV, Section 1:**

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty,

or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Michigan Dormant Mineral Act, Michigan Compiled Laws:

554.291 Oil or gas interest in land; abandonment; claim of interest; vesting in surface owner.

Section 1. Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall, in the absence of the issuance of a drilling permit as to such interest or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, or the use of such interest in underground gas storage operations, during such period of 20 years, be deemed abandoned, unless the owner thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer or record of such interest or within 20 years after the last issuance of a drilling permit as to such interest or actual production or withdrawal of oil or gas, from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of such interest in underground gas storage operations, whichever is later, record a claim of interest as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership. **Drilling permit.** The phrase "drilling permit" shall mean a permit to drill an

oil or gas well issued by the conservation department or its successor. P.A.1963, No. 42, § 1, Eff. Sept. 6.

STATEMENT OF THE CASE

This action to quiet title was filed in a Michigan Circuit Court by John and Etta Mae Bickel and various parties claiming a leasehold estate in oil and gas through the Bickels.[1] Named as defendants were Carl and Doris Worth, both now deceased, and others claiming conflicting rights to the same property.[2]

The facts underlying this case are not in dispute. In 1944, Isabelle Worth deeded to others the surface rights to a parcel of real estate. She, however, reserved the mineral estate pertaining to that parcel. Carl and Doris Worth succeeded to the interests of Isabelle Worth upon her death in 1956. In 1973, they granted an oil and gas lease to Shell Oil Company.[3]

The surface rights sold by Isabelle Worth in 1944 ultimately were conveyed to John and Etta Mae Bickel. In 1974, the Bickels purported to lease oil and gas interests underlying their property to Getty Oil and others.

The premise underlying the Bickels' lease to Getty and their assertion of title to the mineral rights against the Worths is the Michigan Dormant Mineral Act,

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[1] Getty Oil Co., Skelly Oil Co., Total Leonard, Inc., Dow Chemical Co., and Saxon Oil Co.

[2] Shell Oil Co., James and Winifred Fairchild, and Delores Cook d/b/a Southwestern Oil Co.

[3] The Worths have since died, and their daughter and sole heir-at-law, Isabelle Craig, has succeeded to their interests.

Michigan Comp. Laws § 554.291 ("Act"). That statute, which was passed in 1963, provides that "any interest in oil or gas in any land" shall be taken from the subsurface owner and given to the surface owner unless, within the prior 20 years, (1) it has been sold, leased, mortgaged, or transferred by recorded instrument; (2) a "drilling permit" has been issued for such oil or gas; (3) "actual production" or withdrawal of oil or gas has occurred; (4) the lands in question have been pooled, unitized, or otherwise included in a plan of unit operations; or (5) the area has been used for the underground storage of gas.

The Act was not limited to prospective operation. Instead, it applies retroactively to properties, such as those owned by the Worths, where the mineral and surface estates were severed prior to its enactment. Owners of such mineral estates, or those claiming through them, were given three years following the enactment of the statute to register their interest in the mineral estate. Thereafter, failing such registration, the Michigan statute automatically vests title in the surface owner. The statute does not require notice, even by publication, informing subsurface owners that their title is in jeopardy. It operates without the benefit of any process, judicial or administrative. It provides for no payment of compensation.

In the proceedings below, it was conceded that neither the Worths nor those claiming through them had performed any of the acts enumerated in the Act prior to the enactment of the statute, nor had they fulfilled the registration requirement in the three years that followed. The only issue presented for decision was the constitutionality of the statute under both the

Michigan and the federal constitutions. Specifically, the defendants argued in their motion for summary judgment that the Michigan statute deprived them of their property without due process and equal protection of the laws under the Fourteenth Amendment and was an unconstitutional impairment of contract proscribed by Article 1, Section 10, of the United States Constitution.

The trial court granted the Worths' summary judgment motion and struck down the Dormant Mineral Act under the Michigan constitution. That court did not reach the federal questions posed by the Worths' motion for summary judgment. (*See* Appendix C, p. 44a). However, the Michigan Court of Appeals affirmed the trial court's judgment by expanding upon its rationale and finding that "[t]he effect and application of this Act as to the defendants at bar is prohibited by our state and federal constitutions . . . ." (Appendix B, p. 38a).

The Michigan Supreme Court reversed both the state and federal constitutional rulings. Over three dissents, that court concluded that the Act did not deprive the Worths of their property without due process of law. The court also rejected other claims pressed below under the federal constitution's contract and equal protection clauses.

THE QUESTION PRESENTED IS SUBSTANTIAL

This appeal raises important issues under the Fourteenth Amendment that have been decided in a conflicting manner by the highest courts of six States. In recent years, a number of States have passed dor-

mant mineral legislation.[4] In four, the legislation has been invalidated under the federal constitution.[5] The highest courts of Indiana and Michigan, on the other hand, have upheld such legislation.

This Court has recently been presented with appeals from the decision of the Indiana Supreme Court upholding that State's version of a dormant mineral act.[6] Unless those appeals result in summary invalidation of the Indiana law on grounds broadly applicable to the Michigan statute, this case should be set for full oral argument.

The appellants in the Indiana case have made only fleeting reference to the issue to which the first portion of this jurisdictional statement is devoted: the operation of a dormant mineral act as an unconstitutional taking under the Fourteenth Amendment. Instead, appellants there have rested their argument principally upon claims of procedural due process, an issue that is developed in the second portion of this jurisdictional statement.

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[4] *See* Fla. Stat. Ann. § 704.05 (Supp. 1978); Ga. Code § 85-407.1 (1978); Ill. Rev. Stat. ch. 30, §§ 197-98 (1973) (held unconstitutional); Ind. Code §§ 32-5-11-1 to -8 (1976); Mich. Comp. Laws § 554.291 (1970); Minn. Stat. Ann. §§ 93.52 *et seq.* (1977) (held unconstitutional); Neb. Rev. Stat. §§ 57-228 to -231 (1974) (held uncontitutional); N.C. Gen. Stat. § 1-42.1 (1969); Tenn. Code Ann. § 64-704 (Supp. 1978); Va. Code § 55-154 (1974); Wis. Stat. § 700.30 (1978) (held unconstitutional).

[5] *See* discussion at p. 15, *infra*.

[6] Texaco, Inc. v. Short, No. 80-965 (appeal docketed Dec. 19, 1980), Pond v. Walden, No. 80-1018 (appeal docketed Dec. 19, 1980), appealing from Short v. Texaco, Inc., —— Ind. ——, 406 N.E.2d 625 (1980).

In every prior case in the State courts involving this type of legislation, there has been a discussion of procedural due process either without a recognition of the substantive taking question or without a clear exposition of that issue. Through an analysis of the taking question, this Court can bring some order to the by now chaotic collection of State court decisions involving dormant mineral acts.

I.

> "The pertinent words of the Fifth Amendment of the Constitution of the United States are the familiar ones: 'nor shall private property be taken for public use, without just compensation.' That prohibition, of course, applies against the States through the Fourteenth Amendment."

Webb's Fabulous Pharmacies, Inc. v. *Beckwith,* 101 S. Ct. 446, 450 (1980).

By its Dormant Mineral Act, Michigan takes one individual's property and gives it to another without any pretense of providing the procedural and substantive rights that constitutionally are required in eminent domain proceedings. The statute takes, in the words of *Andrus* v. *Allard,* 444 U.S. 51, 66 (1979), the "full 'bundle' of property rights" possessed by a mineral estate owner, not merely "one 'strand' of the bundle." In prohibiting the subsurface owner's "right to exclude" the surface owner from access to any oil or gas underlying the real estate, it takes what is "universally held to be a fundamental element of the property right [that] falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna* v. *United States,* 444 U.S. 164, 179-80 (1979)

(footnote omitted).[7] These and other cases involving lesser invasions by the State of property rights *a fortiori* show the unconstitutionality of the Michigan Dormant Mineral Act.

Pennsylvania Coal Co. v. *Mahon,* 260 U.S. 393 (1922), recently described by this Court as the "leading case" in this area,[8] is most instructive. *Mahon* also dealt with severed mineral interests and the claims of surface owners. There, a Pennsylvania statute prohibited the mining of coal by a mineral estate owner, if such activities threatened to cause subsidence that might endanger the surface owner. Although recognizing that the State could be concerned with public safety under such circumstances, the Court struck down the Pennsylvania statute, because "[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414.

Mahon directly applies here. In that case, nominal title was left in the coal company, but it was prevented from productively using its property in order to protect the surface owner. Here, in order to effect what Michigan considers to be a valid public policy, title is actually taken from the mineral estate owner and is transferred to the surface owner. Thus, as in *Mahon,* "there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413.

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[7] Indeed, the Michigan statute goes beyond the taking condemned in *Kaiser Aetna,* since it gives the surface owner the right to exclude the mineral estate holder from the use of his own property.

[8] Penn Central Trans. Co. v. New York City, 438 U.S. 104, 127, *reh. denied,* 439 U.S. 883 (1978).

That the direct beneficiaries of the Michigan statute are private parties, rather than the state itself, does not make it any less a taking. The same was true in *Mahon.* Moreover, the Court in its recent opinion in *Northern Cheyenne Tribe* v. *Hollowbreast,* 425 U.S. 649 (1976), assumed that the transfer of title to severed mineral interests from one group of private parties to an Indian tribe pursuant to federal legislation would constitute a taking by the United States, if the persons from whom these rights were taken had vested interests. *See* 425 U.S. at 651-52. And in *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 148-55 (1974), this Court recognized that the statutorily directed transfer of railroad properties to Conrail—"basically a private, not a governmental, enterprise," *id.* at 152—could "indeed be a taking of private property for public use." *Id.* at 155. *See also Berman* v. *Parker,* 348 U.S. 26, 33-34 (1954).

The Michigan Supreme Court upheld the Michigan statute against the Worths' constitutional challenge by posing the question "whether it was a proper exercise of the state's police powers" (Appendix A, p. 8a), and by placing upon the Worths the burden of "prov[ing] either that no public policy is served by the act or that no reasonable relationship exists" between it and the public purpose that it sought to achieve (Appendix A, pp. 8a-9a). Posing the wrong question, the Michigan court reached the wrong result.

Whether or not the Michigan act is reasonably related to a valid public purpose, the fact remains that the legislature has used that purpose to define the type of mineral interest that the State desires to take from certain property owners and give to others. Michigan

has, by statute, identified five criteria (*see* p. 5, *supra*) as indicating that particular mineral estates would, in its judgment, more likely be developed if placed in the hands of the surface owner. This is no different than Michigan's definition by statute of a particular kind of property that could best be used as a right-of-way for a public highway. Even assuming Michigan had wisely chosen the right location for the highway, or here has properly identified the kind of mineral estate that might be better developed by someone else, it has merely established the public purpose to be served by the taking.

The definition of the public purpose to be served by a taking is properly a legislative question. *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 282-83 (1925). But even a sound legislative declaration of the purpose to be served by a taking does not negate the need for the notice, hearing, and just compensation that constitutionally must accompany the taking. These requirements of the due process clause cannot be avoided by legislative declarations as to the need for the taking. *Id.* at 285.

It is also clear that the Michigan court's reference to recording acts cannot sustain Michigan Dormant Mineral Act. (Appendix A, pp. 10a-15a.) Under a recording act, a subsequent *bona fide* purchaser's title to property is deemed superior to that of a prior purchaser who failed to record the deed or other instrument evidencing the transaction upon which claim of ownership is based. The recording act does not take the entire "bundle of rights" from the prior purchaser; he or she retains a cause of action against the seller. *Compare Penn Central Transportation Co.* v. *New York City, supra*, 438 U.S. at 137. The Dormant Mineral Act, by contrast,

deprives owners of oil and gas properties of every vestige of ownership.[9]

Any attempt to liken the Michigan statute to common-law abandonment must also fail. Indicia of abandonment are merely evidence of a surface owner's intention to relinquish his property and make it available to another. *Cf. Baglin* v. *Cusenier Co.*, 221 U.S. 580, 597-98 (1911).[10] The Michigan Supreme Court squarely held that the Michigan act was not based on such an evidentiary presumption:

> "[T]he act does not create any evidentiary presumption. None of the provisions of the act purport to be concerned with the owner's intent to abandon . . . . Rather, the act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least every 20 years." (Citation omitted.) (*See* Appendix A, p. 17a.)

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[9] The Michigan Supreme Court's reliance upon Jackson v. Lamphire, 28 U.S. 280 (1830) (Appendix A, pp. 13a-14a) to sustain the constitutionality of applying a recording act to void a deed that preceded the act is of no significance for an additional reason. As the lower court recognized, *Jackson* was decided prior to adoption of the Fourteenth Amendment and was based upon the contract clause of the federal constitution. (Appendix A, p. 13a). A state's power to impair contracts is measured by a less stringent standard than the one used under the Fourteenth Amendment to measure its power to take property. *Compare* Home Building & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934), *with* Pennsylvania Coal Co. v. Mahon, *supra*, 260 U.S. 393.

[10] By contrast, an oil and gas estate owner's decision not to develop the resource may be a function of economic or other considerations. Certainly, such inactivity does not bespeak an intention to abandon the property.

The State court's construction of the Michigan statute is, of course, binding on this Court. *See, e.g., Webb's Fabulous Pharmacies, Inc.* v. *Beckwith, supra,* 101 S. Ct. at 450; *Standard Oil Co.* v. *New Jersey,* 341 U.S. 428, 432 n.2 (1951), and cases cited therein.

In sum, Michigan has purported to encourage oil and gas development through the taking of private property without observing the procedural or substantive safeguards associated with eminent domain proceedings. By upholding the legislature's choice of means in this case, the Michigan Supreme Court fell into the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon, supra,* 260 U.S. at 416.

II.

In addition to the Michigan statute's failure to afford the constitutionally-mandated procedures and remedies that limit a State's use of its eminent domain power, the Dormant Mineral Act unconstitutionally fails to provide the notice and opportunity to be heard that this Court has prescribed for deprivations of property that do not rise to the level of a taking.

Mullane v. *Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950), is the leading case in this area. There, the Court required personal notice for individuals readily identifiable and notice by publication for all others prior to the appointment of a trustee to manage certain trust assets. As the Court explained, "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality

is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314.

Thus, even if its operation does not result in an uncompensated taking, the Dormant Mineral Act is fatally deficient. It effects a destruction of title, not merely an appointment of a trustee, without notice of any kind. Absent owners are given no opportunity to appear in any proceeding "to present their objections" before their property is taken from them.

This Court's review of cases involving state escheat statutes validates this reading of *Mullane*. *See Standard Oil Co.* v. *New Jersey,* 341 U.S. 428 (1951); *Anderson National Bank* v. *Luckett,* 321 U.S. 233 (1944); *Security Savings Bank* v. *State of California,* 263 U.S. 282 (1923). In these cases, various statutes provided that certain "dormant" property—inactive bank accounts, unclaimed dividends, or the like—would escheat to the state after the passage of a specified number of years. In each case, this Court has made it clear that escheat statutes must provide notice and an opportunity for the absent owner to appear and declare his or her interest in the property at issue. Thus, in *Anderson National Bank, supra,* the Court stated, "[O]ur inquiry must be directed to the question whether the procedure by which the state undertakes to acquire the depositors' right to demand payment of the deposits was upon adequate notice to them and opportunity for them to be heard." 321 U.S. at 243. *See also Standard Oil Co.* v. *New Jersey, supra,* 341 U.S. at 432-35; *Security Savings Bank* v. *State of California, supra,* 263 U.S. at 287.

Plainly, Michigan's Dormant Mineral Act produces a deprivation of property that is at least as complete as that brought about by an escheat statute. It, therefore, is subject to the same constitutional safeguards.

III.

With its decision in this case, the Michigan Supreme Court becomes the second state court of last resort to uphold a dormant mineral statute in the face of a substantial challenge on federal constitutional grounds. *See* pp. 6-7, *supra*. The highest courts of four other States, on the other hand, have invalidated similar legislation under the Fourteenth Amendment. *See Wilson* v. *Bishop*, 82 Ill. 2d 364, 412 N.E.2d 522 (1980); *Contos* v. *Herbst*, —— Minn. ——, 278 N.W.2d 732, *appeal dismissed sub nom.*, 444 U.S. 804 (1979); *Wheelock* v. *Heath*, 201 Neb. 835, 272 N.W.2d 768 (1978); *Chicago & North Western Transportation Co.* v. *Pedersen*, 80 Wis. 2d 566, 259 N.W.2d 316 (1977).

In addition, at least four other states—Florida, Georgia, Tennessee, and Virginia—have enacted dormant mineral legislation. *See* Note, *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 Ind. L. Rev. 455, 459 n.19 (1979). Thus, the potential exists for further conflicts among the States. The existence of a substantial federal question as to which the state courts have reached and may continue to reach contradictory conclusions is a compelling reason for granting plenary review. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, *supra*, 101 S. Ct. at 449-50; *Fuller* v. *Oregon*, 417 U.S. 40, 42 (1974). *See also Citizens & Southern National Bank* v. *Bougas*, 434 U.S. 35, 37 (1977); *United States* v. *Oregon*, 366 U.S. 643, 645, *reh. denied*, 368 U.S. 870 (1961).

CONCLUSION

For the reasons recited above, this Court should grant this appeal and hear this case on the merits.

Respectfully submitted,

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APPENDIX

APPENDIX A

STATE OF MICHIGAN
SUPREME COURT

No. 62256

H. JOHN VAN SLOOTEN, *Plaintiff-Appellee,*

v.

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, devisees, legatees, and assignees of NELLIE F. GILL, deceased,
Defendants-Appellants,

No. 61917

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, a Delaware Corporation, SKELLY OIL COMPANY, a Delaware Corporation, TOTAL LEONARD, INC., a Michigan Corporation, THE DOW CHEMICAL COMPANY, a Delaware Corporation, SAXON OIL COMPANY, a Texas Corporation,
Plaintiffs and Appellants,

v.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corporation, DELORES M. COOK, d/b/a SOUTHWESTERN OIL COMPANY, *Defendants and Appellees.*

BEFORE THE ENTIRE BENCH

M. S. COLEMAN, C.J.

The issue in these cases is the constitutionality of the dormant mineral act, MCL 554.291 *et seq.*; MSA 26.1163(1)

et seq.,[1] as applied to these oil and gas interests created prior to the passage of the act in 1963. In *Bickel* v *Fairchild*, 83 Mich App 467; 268 NW2d 881 (1978), the Court of Appeals held that the act unconstitutionally impaired

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[1] MCL 554.291; MSA 26.1163(1) provides:

"Sec. 1. Any interest in oil or gas in any land owned by any person other than the owner of the surface, which has not been sold, leased, mortgaged or transferred by instrument recorded in the register of deeds office for the county where such interest is located for a period of 20 years shall, in the absence of the issuance of a drilling permit as to such interest or the actual production or withdrawal of oil or gas from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized or included in unit operations therewith, or the use of such interest in underground gas storage operations, during such period of 20 years, be deemed abandoned, unless the owner thereof shall, within 3 years after the effective date of this act or within 20 years after the last sale, lease, mortgage or transfer of record of such interest or within 20 years after the last issuance of a drilling permit as to such interest or actual production or withdrawal of oil or gas, from said lands, or from lands covered by a lease to which such interest is subject, or from lands pooled, unitized, or included in unit operations therewith, or the use of such interest in underground gas storage operations, whichever is later, record a claim of interest as hereinafter provided. Any interest in oil or gas deemed abandoned as herein provided shall vest as of the date of such abandonment in the owner or owners of the surface in keeping with the character of the surface ownership."

Statutes relating to severed mineral interests have been enacted in other jurisdictions. Although they are all designed to improve the marketability of severed mineral interests, they employ different approaches to their objective. Therefore it is necessary to analyze each statute's provisions in detail when comparing and contrasting it with Michigan's act. See Ill Ann Stat, ch 30, § 197 (Smith-Hurd), held unconstitutional in *Wilson* v *Bishop*, —— Ill 2d ——; —— NE2d —— (1980), Ind Code Ann §§ 32-5-11-1 *et seq.* (Burns), held constitutional in *Short* v *Texaco Inc*, ——

the obligation of contract. In *Van Slooten* v *Larsen*, 86 Mich App 437; 272 NW2d 675 (1978), another panel of the Court of Appeals upheld the constitutionality of the act. We hold that the act does not unconstitutionally impair the obligations of contracts as applied in these cases.

I.

In Michigan, the ownership of a mineral interest can be severed from the ownership of the surface estate, see *Rathbun* v *Michigan*, 284 Mich 521, 534; 280 NW 35 (1938). At common law, these severances create fee estates, corporeal hereditaments, for the owners of the severed mineral interests,[2] which could not be abandoned.[3]

Ind ——; 406 NE2d 625 (1980), Minn Stat Ann § 93.52 *et seq.*, Neb Rev Stat §§ 57-228—57-231, held unconstitutional in *Wheelock* v *Heath*, 201 Neb 835; 272 NW2d 768 (1978), SD Compiled Laws Ann § 43-30-8.1, NC Gen Stat §§ 1-42.1—1-42.3. See, also, Minn Stat Ann § 93.55; Wis Stat Ann § 700.30, held unconstitutional in *Chicago & North Western Transportation Co* v *Pedersen*, 80 Wis 2d 566; 259 NW2d 316 (1977). See, also, Fla Stat Ann § 704.05, Ga Code Ann § 85-407.1, La Civ Code Ann art 753, Tenn Code Ann § 64-704, Va Code §§ 55-154, 55-155. See, also, fns 14, 15, 26 and 28, *infra*.

[2] See 54 Am Jur 2d, Mines and Minerals, § 116, p 299, 1A Thompson, Real Property, § 160, p 30.

[3] See 1 Williams & Meyers, Oil and Gas Law, § 210.1, p 110, Roberton, *Abandonment of Mineral Rights*, 21 Stanford L Rev 1227 (1969), Simonton, *Abandonment of Interests in Land*, 25 Ill L Rev 261 (1930). The rationale underlying the common-law prohibition against abandoning corporeal hereditaments concerns problems peculiar to feudal tenure and society, see 4 Kent, Commentaries (14th ed), p 259, Roberton, *supra*, 1228, but the prohibition still remains part of the common law, see *In re Estate of Matt Miller*, 274 Mich 190, 193; 264 NW 338 (1936). Interests in land can be abandoned in civil-law jurisdictions, see *Sena* v *United States*, 189 US 233, 239-240; 23 S Ct 596; 47 L Ed 787 (1903),

The dormant mineral act provides that if the owner of a severed oil and gas interest fails to take actual possession of the interest as specified in the act,[4] transfer the interest by recorded instrument, or record a notice of claim of interest for a period of 20 years, the interest is deemed abandoned and title to it vests in the owner or owners of the surface estate. The act, passed in 1963, also provided a three-year grace period in which owners of interests created before the act was passed could record a claim of interest and preserve their interests.

Although we recognize the fact that the Legislature *could have* adopted other, if more tortuous, means of addressing this foreseeably increasing problem of mineral shortages, it *did not*. Therefore, we must commence with the concept that the statute must be presumed to be constitutional.

II.

The relevant facts in these cases are very similar.[5] In both cases, the owner of the land sold it by a deed recorded prior to 1946, excepting from the conveyance the title to the oil and mineral estates. In 1963, the dormant mineral act was passed. Because the owners of the severed oil and gas interests had not performed any of the acts specified in the act or recorded a claim of interest for a period of over

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La Civ Code Ann art 753. Incorporeal interests, such as easements and profits *à prendre*, are subject to abandonment at common law, see *Gerhard* v *Stephens*, 68 Cal 2d 864; 442 P2d 692; 69 Cal Rptr 612 (1968). It is the corporeal nature of these interests which necessitates the analysis of the state's police power in Part IV, *infra*.

[4] See fn 1, *supra*.

[5] The relevant facts are stated in more detail in *Bickel* v *Fairchild*, 83 Mich App 467; 268 NW2d 881 (1978), and *Van Slooten* v *Larsen*, 86 Mich App 437; 272 NW2d 675 (1978).

20 years by 1966, their interests, pursuant to statute, were deemed abandoned and vested in the owners of the surface estates. In *Van Slooten*, the defendants, claiming through the reservation of title to the mineral interests in the deed severing the interests, executed oil and gas leases covering their interests in 1970. In *Bickel*, the owners of the mineral interests, the owners of the surface estate in 1966 and the present owners of the surface estate, all executed separate oil and gas leases covering the land in 1973 and 1974. The owners of the surface estates then filed suit to quiet title to the oil and gas interests.

III.

Defendants contend that the act unconstitutionally impairs the obligation of contracts, US Const, art I, § 10, Const 1963, art 1, § 10. They argue that the act severely impairs and destroys reliance interests, favors narrow private groups, was not prompted by any emergency or tailored to meet one and was not temporary or experimental, and thus that the statute unconstitutionally impairs the obligation of contracts. Compare *Home Building & Loan Ass'n* v *Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413 (1934).

When adjudicating impairment claims, the first inquiry should be whether the act has, in fact, operated as a substantial impairment of the contract relationship. The severity of the impairment determines the height of the hurdle the act must clear, *Allied Structural Steel Co* v *Spannaus*, 438 US 234, 244-245; 98 S Ct 2716; 57 L Ed 2d 727 (1978).

El Paso v *Simmons*, 379 US 497; 85 S Ct 577; 13 L Ed 2d 446 (1965), is instructive in reaching the conclusion that, although the consequences of failing to undertake one of the specified acts or to record a claim of interest every 20 years may be severe, the obligation to record is so mini-

mal that the presumption of constitutionality is not overcome.

El Paso involved a Texas statute that cut off a purchaser's right to re-claim land forfeited to the state for non-payment of the purchase price after five years from the original default. Prior to the enactment of the statute, a purchaser's right to have claims reinstated by paying the full amount due up to the date of reinstatement was unlimited. The Court upheld the statute although failure to meet the additional requirement (payment within five years) resulted in a complete forfeiture of any remaining rights in the property.

In the instant cases, the impairment or additional obligation imposed by the act cannot seriously be contended to have comprised a "high" hurdle. Neither can it be seriously contended that the defendants were substantially induced to enter the initial contractual relationships in reliance on the fact that their interests need not be recorded, or recorded more than once, or that such a requirement significantly changed their bargaining position.

In *Short* v *Texaco, Inc,* —— Ind ——; 406 NE2d 625 (1980), the Court upheld Indiana's mineral lapse act, Ind Code §§ 32-5-11-1 *et seq.*, a statute similar to Michigan's dormant mineral act, holding that it did not violate the constitutional prohibition against impairment of obligations of contract. The Court found the act, for the purpose of constitutional analysis, analogous to acts of limitation. The Court concluded that the Legislature adopted means which were rationally related to its valid objectives and held that the act did not unconstitutionally impair the obligation of contract.

Recording statutes long have been upheld in the face of constitutional challenges on impairment grounds, see *Jackson* v *Lamphire,* 28 US 280; 7 L Ed 679 (1830). The re-

quirement of periodic recording furthers valid state interests. "The measure taken * * * was a mild one indeed, hardly burdensome to the purchaser * * * but nonetheless an important one to the State's interest", *El Paso, supra,* 516-517.

We hold that MCL 554.291 *et seq.;* MSA 26.1163(1) *et seq.* does not unconstitutionally impair the obligation of contract.

IV.

Defendants claim the act violates the constitutional protection against deprivation of property without due process of law, US Const, Am XIV, Const 1963, art 1, § 17. Defendants argue that by making a corporeal hereditament subject to abandonment the act has unconstitutionally changed the nature of defendants' interests and by requiring a record owner in constructive possession to take specific actions to preserve the interest, the act has unconstitutionally changed a property right into a mere cause of action, see *Groesbeck* v *Seeley,* 13 Mich 329 (1865).[6] Statutes which require property owners *in possession* to institute a proceeding within a specified time or lose their property have been held unconstitutional because a state cannot require one in possession of all that he demands to prosecute a suit to preserve his interest when no adverse interest is asserted by suit or possession, see *Groesbeck, supra,* 343.

Significant differences exist, however, between the dormant mineral act and the statutes which have been held unconstitutional for converting a property right into a

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[6] See, also, *Biltmore Village* v *Royal,* 71 So 2d 727 (Fla, 1954), *Murrison* v *Fenstermacher,* 166 Kan 568; 203 P2d 160 (1949), *Girard Trust Co* v *Pennsylvania R Co,* 364 Pa 576; 73 A2d 371 (1950), Anno: *Constitutionality of a Statute which Reduces Title to Real Estate to a Mere Cause of Action,* 7 ALR2d 1366.

mere cause of action. This act specifically exempts from its abandonment provisions those interests which have been occupied as specified in the act at any time within the last 20 years. More importantly the act does not require the owner to institute a suit (at a time when conceivably there is no one to sue) to preserve title to the interest. The act only requires the owner to record a notice of his claim every 20 years. Although the validity of such recording requirements will be discussed more thoroughly *infra*,[7] it is sufficient to recognize at this point that statutes imposing recording requirements have been upheld when a reasonable time is provided for recording existing interests, see *Wichelman* v *Messner*, 250 Minn 88; 83 NW2d 800 (1957). We therefore hold that the act does not unconstitutionally change defendants' property rights into mere causes of action.

However, the act does convert a corporeal hereditament which at common law could not be abandoned into an interest which is subject to abandonment. Whether this change constitutes a deprivation of property without due process depends upon whether it was a proper exercise of the state's police powers, see *Wyant* v *Director of Agriculture*, 340 Mich 602, 608; 66 NW2d 240 (1954).

Defendants claim that the act is unreasonable, arbitrary and capricious, and not a proper exercise of the police power. Accordingly, they carry the burden of overcoming the presumption of constitutionality[8] and must prove either that no public purpose is served by the act or that no reasonable relationship exists between the remedy

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[7] See Part IV B, *infra*.

[8] See *Shavers* v *Attorney General*, 402 Mich 554, 613; 267 NW2d 72 (1978), *Michigan Canners & Freezers Ass'n, Inc* v *Agricultural Marketing & Bargaining Board*, 397 Mich 337, 343-344; 245 NW2d 1 (1976), *Thayer* v *Dep't of Agriculture*, 323 Mich 403, 411; 35 NW2d 360 (1949).

adopted and the public purpose sought to be achieved.[9] The presumption of constitutionality favors validity and if the relationship between the statute and public welfare is debatable, the legislative judgment must be accepted, see *Grocers Dairy Co* v *Dep't of Agriculture Director*, 377 Mich 71, 76; 138 NW2d 767 (1966), *Carolene Products Co.* v *Thomson*, 276 Mich 172, 178; 267 NW 608 (1936).

A.

Defendants claim that no valid public purpose is furthered by the act because at the time of its enactment the fuel crisis and need for developing oil and gas resources were not critical. However, the clear purpose of the act is to facilitate the development of oil and gas resources, see *Van Slooten, supra*, 446, Street, *Need for Legislation to Eliminate Dormant Royalty Interests*, 42 Mich State Bar J 49 (March, 1963).[10] The importance of facilitating the development of oil and gas resources was recognized long before the current "energy crisis".[11] Defendants' argument that encouraging the development of oil and gas resources is not a valid public purpose is not persuasive.

Although the most apparent benefactor of the act is the owner of the surface estate who may receive title to the interest upon the owner's failure to record, others will also

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[9] See *Shavers, supra*, 612, *Michigan Canners, supra*, *Grocers Dairy Co* v *Dep't of Agriculture Director*, 377 Mich 71, 76; 138 NW2d 767 (1966).

[10] See Minn Stat Ann § 272.039 which declares that one of its purposes is to cure problems in "identification of separately owned mineral interests by taxing authorities requir[ing] title searches which are extremely burdensome and, where no public tract index is available, prohibitively expensive." See, also, Minn Stat Ann § 93.52, NC Gen Stat §§ 1-42.1—1-42.3.

[11] See Veasey, *Law of Oil and Gas*, 18 Mich L Rev 445 (1920).

benefit from the act. The primary purpose of the act is not to vest title to the severed interests in the surface owner but rather is to facilitate development of those subsurface properties by reducing the problems presented by fragmented and unknown ownership. The act as a whole works to the benefit of the public by improving the marketability of severed mineral interests and thereby increasing the development of fossil fuels, the revenues from property taxes, and employment with its related benefits. Defendants have not demonstrated that the act is unconstitutional because of the absence of a valid public purpose.

B.

Defendants also argue that no reasonable relationship exists between the remedy adopted and the public purpose to be achieved because the act does not facilitate the development of mineral estates. Further, they contend that in purporting to transfer title to the owner of the surface estate, the act does not facilitate negotiations and development but actually hinders them by removing the developer's security in dealing with an owner of record. In any event, defendants argue, it would be more logical to vest title to the abandoned estate in the owner of the nearest active mineral estate rather than the owner of the surface estate.

Contrary to defendants' contentions, we conclude that a reasonable relationship exists between the remedy adopted and the public purpose sought to be achieved. The commercial nature of, and common-law rules relating to, severed mineral interests have created significant problems for one attempting to secure title to, or permission to develop, a severed mineral interest.

Upon severance of the surface and mineral estates, the ownership of the mineral estate often becomes fraction-

alized with the passage of time.[12] The commercial nature of these interests make it likely that they may be owned by a number of people who are not familiar with the property, the owner of the surface estate or even each other. Moreover, in the absence of a recording statute, there are no countervailing influences in the law to reduce or limit the tendency of these fractional interests to be owned by unknow or unlocatable owners. Unlike incorporeal interests, corporeal interests cannot be abandoned under the common law.[13] Furthermore, absent actual possession of the severed mineral estate, possession of the surface estate pursuant to a deed reserving a severed mineral interest cannot ripen into adverse possession of the mineral estate.[14] Also, in the absence of actual development of the severed mineral estates (the act would then be inapplicable), it is unlikely that property tax assessment rolls will contain the

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[12] Frequently, portions or fractional interests in these severed oil interests are divided among several persons in attempts to spread the cost of their acquisition or to limit the risks assumed by each individual. Interests may also become fractionalized as their owners sell portions of them for profit as opposed to profiting from the development and sale of the oil. Distributions following the death of an interest holder also tend to create fractional interests owned by a number of persons, see Kuntz, *Old and New Solutions to the Problem of the Outstanding Undeveloped Mineral Interest*, 22 Institute on Oil & Gas Law & Taxation 81 (1971).

[13] See fn 3, *supra*.

[14] 1 Williams & Meyers, *supra*, § 224.1, p 339, Kuntz, *Adverse Possession of Severed Mineral Interests*, 5 Rocky Mountain Mineral Law Institute 409 (1959), Case Note, *Mines and Minerals—Oil and Gas—What Constitutes Adverse Possession of Severed Mineral Interest by Surface Possessor*, 17 Ala L Rev 126 (1964). Anno: *Acquisition of Title to Mines or Minerals by Adverse Possession*, 67 ALR 1440, supplemented in 35 ALR2d 124. See Ga Code Ann § 85-407.1 which changes these common-law rules in an attempt to cure problems caused by dormant mineral interests.

names of their owners.[15] Accordingly, the title to the severed mineral estate tends to become fractionalized over time and increases the likelihood that a potential developer will not be able to locate the owners of the interest to make the conveyance necessary to begin the development process. Without a recording requirement, the task of locating the necessary owners may be impossible or prohibitively expensive.[16] Moreover, the alternative of attempting to develop the mineral interest without the owner's consent is not attractive.[17]

Therefore, the dormant mineral act was passed to reduce the likelihood that the presence of unknown or unlocatable

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[15] See Minn Stat Ann § 272.039, Roberton, *supra*, 1231, Street, *Need for Legislation to Eliminate Dormant Royalty Interests*, 42 Mich State Bar J 49 (March, 1963). See, also, Minn Stat Ann §§ 272.04, subd 1; 273.13, subd 2a, Wis Stat Ann § 700.30, which attempt to cure problems caused by dormant mineral interest by taxing them.

[16] See 1 Williams & Meyers, *supra*, § 224.1, p 345. Given the risks involved in the exploration for oil resources and the uncertainty of whether any recovery will be realized, any significant increase in prepartory costs may become prohibitive.

[17] In proceeding without the owner's consent, all risks and expenses are assumed by the developer. If oil is discovered and the operation is successful, the owner can sue in trespass and recover either the value of the resources or their value minus the expenses of recovery depending on whether the trespasser acted in good or bad faith, see 1 Williams & Meyers, *supra*, § 226, p 372. In any event, the developer assumes all the risks in attempting to recover the oil. Furthermore, if the attempt at recovery is unsuccessful, the developer not only bears all the expenses but may be sued for damages caused by impairing the land's speculative value as a potential oil source, see *Humble Oil & Refining Co* v *Kishi*, 276 SW 190, 191 (Tex Comm App, 1925), Kuntz, *Old and New Solutions*, *supra*, 86-88, Roberton, *supra*, 1232-1233, 1 Williams & Meyer, *supra*, § 229, p 401.

owners or fractionalized ownership of severed interests would unnecessarily hinder or prevent the development of these resources by requiring an owner to do certain specified acts indicating ownership or record a claim of interest every 20 years. It places no undue burden upon owners. Without such a requirement, knowledge of the ownership could be lost in time. Potential resources go undeveloped in the absence of viable ownership.

The recording provision of the act provides a simple method by which owners of undeveloped severed mineral interests can preserve them. Statutes imposing recording requirements have been upheld when a reasonable time is provided for the recording of existing interests, see *Wichelman, supra.* Even before the adoption of US Const, Am XIV, the United States Supreme Court upheld the constitutionality of a recording statute, stating:

"It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; *and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fradulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts*; such too is the power to pass acts by limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned.

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"As this court is confined to the consideration of only one question growing out of this law, we do not think it necessary to examine its provisions in detail: it is sufficient to say, that we can see nothing in them inconsistent with the constitution of the United States, or the principles of sound legislation. *Whether it is considered as an act of*

limitations, or one in the nature of a recording act, or as a law sui generis, called for by the peculiar situation of that part of the state on which it operates; we are unanimously of opinion, that it is not a law which impairs the obligation of a contract". Jackson v *Lampshire, supra,* 290-291. (Emphasis added).

Given that a state has the power to require the recording of an interest as a condition to preserving title to the interest when no recording was required at the time the interest was created, the defendants have not demonstrated that due process prohibits a state from requiring further periodic rerecording to achieve similar objectives,[18] see *Evans* v *Finley,* 166 Or 227; 111 P2d 833 (1941), *Opinion of the Justices,* 101 NH 515; 131 A2d 49 (1957), *Wichelman, supra,* Simes & Taylor, Improvement of Conveyancing by Legislation (Ann Arbor: University of Michigan Law

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[18] In analogizing the dormant mineral act to a recording statute, one must recognize that differences exist between them. Although both may operate to divest an owner of his title, the recording act was designed to protect bona fide purchasers while the dormant mineral act may favor one who has never claimed an interest in the mineral estate.

It is sufficient to note at this time that the acts further different objectives. The dormant mineral act was designed to remedy problems that were not addressed by the recording act. The recording act eliminated many of the problems relating to bona fide purchasers. Any purchaser of these lands will have record notice of the severed mineral interests.

The dormant mineral act was designed to increase the marketability of these mineral interests by requiring periodic recording to reduce the problems caused by owners whose identity and location are unknown. Recognizing that increasing marketability or removal of fetters to marketability are valid public purposes, we are persuaded that the requirement of periodic recording is as reasonably related to this objective as the original recording requirement is related to the objective or protecting bona fide purchasers.

School, 1960), p 268. There is nothing inherent in a recording act which mandates that a recording be eternally effective, see *American Land Co* v *Zeiss*, 219 US 47; 31 S Ct 200; 55 L Ed 82 (1911). The utility and benefits of requiring periodic recording of interests in land are well-recognized. For these reasons we conclude that a reasonable relationship exists between the act's requirement that an owner take possession of the interest in a manner specified or record a claim of interest every 20 years and the public purpose sought be achieved.

A reasonable relationship also exists between the purpose of the statute and the provisions vesting title of the severed interest in the owner of the surface estate upon the failure to do any of the statutorily required acts. It places the title to the interest in one more likely to be located than the owners of the mineral interest. Potential developers, owners of other severed interests, and the owners of the surface estate are then in a position to begin the preparatory steps necessary for development. Similar results follow upon abandonment of other incorporeal mineral interests in other states,[19] and under common-law concepts of adverse possession.[20] Although vesting title in the owner of the surface estate does not guarantee that the interest's potential for development will be realized, the act was not designed to remove all possible impediments to development.[21] Its purpose is to limit the difficulties presented by unknown or unlocatable owners.

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[19] In civil-law jurisdictions the title to abandoned severed mineral interests vest in the owner of the estate from which they were carved, see La Civ Code Ann arts 753, 3546. The same result occurs upon the abandonment of incorporeal interests in land at common law, see *Gerhard, supra.*

[20] See Anno, 35 ALR2d, *supra*, 124, 129, 173.

[21] The act is merely one portion of the Legislature's efforts to remove and regulate unwarranted impediments to the development of oil resources, see MCL 319.1 *et seq.*; MSA 13.139(1) *et seq.*, MCL 319.101 *et seq.*; MSA 13.140(1) *et seq.*

While recognizing that it may be just as logical to vest title in the owner of the nearest active mineral estate or in the state,[22] or to provide that the state hold and sell the interest for the benefit of the owners,[23] we also must recognize that possible alternatives do not render the act unconstitutional. "[I]f the relation between the statute and the public welfare is debatable, the legislative judgment must be accepted," *Carolene Products Co* v *Thomson, supra,* 178.

V.

Defendants argue that the act violates due process by creating an arbitrary and unreasonable conclusive presumption of abandonment, see *Heiner* v *Donnan,* 285 US 312; 52 S Ct 358; 76 L Ed 772 (1932), *Detroit* v *Bowden,* 6 Mich App 514; 149 NW2d 771 (1967), *lv den* 379 Mich 772 (1967).

The essential elements of abandonment are an intention to relinquish the property and acts putting that intention into effect, see *Log-Owners' Booming Co* v *Hubbell,* 135 Mich 65, 69; 97 NW 157 (1903), *Emmons* v *Easter,* 62 Mich App 226; 233 NW2d 239 (1975). Defendants claim that the actions listed in the act are not the only means by which one can possess or indicate ownership of a severed mineral estate and that the failure to do any of the acts specified in the statute is not necessarily determinative of an owner's intent to abandon. Because abandonment is concerned with the owner's intent to abandon, due process for-

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[22] See *Derry* v *Ross,* 5 Colo 295 (1880), Minn Stat Ann § 93.55, 1 Am Jur 2d, Abandoned Property, § 6, pp 8-9. At common law, abandoned property was not the subject of escheat, but was subject to appropriation by the sovereign as *bona vacantia,* see *Anderson National Bank* v *Luckett,* 321 US 233, 240; 64 S Ct 599; 88 L Ed 692 (1944).

[23] See MCL 319.108; MSA 13.140(8).

Even *arguendo* accepting defendants' characterization of the abandonment provisions as a presumption, the act does not create an unconstitutional presumption. A statutory presumption violates due process if there is no rational connection between the facts established and the facts to be presumed.[25] Although the failure to occupy or develop a mineral interest for an extended length of time would not, in itself, be sufficient to support a finding of abandonment at common law, see *Doty* v *Gillett*, 43 Mich 203; 5 NW 89 (1880), it is within the Legislature's power and experience to conclude that the owners who have not developed, transferred or recorded their severed mineral interests for over 20 years have abandoned them.[26] Although some owners who have not completed any of the requirements specified in the act may have never intended to abandon their interests, defendants have not demonstrated that the presumed fact is not "more likely than not to flow from the proved fact".[27] Considering the nature of the interests af-

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claim affected by the acts are different, the two acts have similar objectives and requirements and both lead to substantially the same result.

[25] See *Cleveland Board of Education* v *La Fleur*, 414 US 632; 94 S Ct 791; 39 L Ed 2d 52 (1974), *United States Dep't of Agriculture* v *Murry*, 413 US 508; 93 S Ct 2832; 37 L Ed 2d 767 (1973), *Vlandis* v *Kline*, 412 US 441; 93 S Ct 2230; 37 L Ed 2d 63 (1973), *Bell* v *Burson*, 402 US 535; 91 S Ct 1586; 29 L Ed 2d 90 (1971), *Heiner* v *Donnan*, 285 US 312; 52 S Ct 358; 76 L Ed 772 (1932), see, also, *Leary* v *United States*, 395 US 6, 36; 89 S Ct 1532; 23 L Ed 2d 57 (1969), *People* v *Gallagher*, 404 Mich 429, 438; 273 NW2d 440 (1979).

[26] Although not controlling, the relevancy of such failures is demonstrated by other states' statutes which deem the interest abandoned after non-use over an extended period of time, see Ill Ann Stat, ch 30, § 197 (Smith-Hurd) (25 years), Ind Code Ann § 32-5-11-1 (Burns) (20 years), Neb Rev Stat § 57-229 (23 years).

[27] *Leary, supra*, 36.

bi[illegible] the taking of property on the basis of a permanent and irrebuttable presumption of abandonment which is "not necessarily or universally true in fact", they argue. See *Vlandis* v *Kline*, 412 US 441, 452; 93 S Ct 2230; 37 L Ed 2d 63 (1973).

Contrary to defendants' arguments, the act does not create any evidentiary presumption. None of the provisions of the act purport to be concerned with the owner's intent to abandon, compare *Vlandis, supra*, 452; *Weinberger* v *Salfi*, 422 US 749, 770-772; 95 S Ct 2457; 45 L Ed 2d 522 (1975). Rather, the act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least every 20 years. The statutory approach to these issues has the added advantage of eliminating uncertainty and minimizing litigation,[24] see *In re Mercure Estate*, 391 Mich 443, 448; 216 NW2d 914 (1974).

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[24] The same result could have been achieved without any reference to the concept of abandonment by "deeming the owner of the surface estate to have marketable record title to the severed interest" at the expiration of the statutory period, see MCL 565.101 *et seq.*; MSA 26.1271 *et seq.*, see, also, NC Gen Stat §§ 1-42.1—1-42.3, SD Compiled Laws Ann § 43-30-8.1. Marketable title acts have been upheld in the face of constitutional challenges, see *Miami* v *St Joe Paper Co*, 364 So 2d 439 (Fla, 1978), *Tesdell* v *Hanes*, 248 Iowa 742; 82 NW2d 119 (1957), *Wichelman* v *Messner*, 250 Minn 88; 83 NW2d 800 (1957), Aigler, *Constitutionality of Marketable Title Acts*, 50 Mich L Rev 185 (1951), supplemented in 56 Mich L Rev 225 (1957), Note, *Constitutionality of Marketable Title Legislation*, 47 Iowa L Rev 413 (1962). Although the dormant mineral act does not attempt to cure problems caused by conflicting claims in the same chain of title, its purpose is similar to the purpose of the marketable title acts in that it is designed to remove impediments to a severed mineral interests title's marketability caused primarily by the presence of unknown or unlocatable owners of undeveloped interests. Although the source of the

fected by the act and the rational connection existing between the proven facts and the determination of abandonment, defendants have not demonstrated that the act denies them due process of law by creating an unconstitutional presumption.

VI.

Defendants also claim that the act violates due process because it contains no provisions for notice [28] or a hearing to determine the validity of the "abandonment" before the title vests in the owner of the surface estate, see *Contos* v *Herbst*, 278 NW2d 732, 743 (Minn, 1979); *Wheelock* v *Heath*, 201 Neb 835, 844; 272 NW2d 768 (1978).

It has been repeatedly observed that due process requires that one deprived of liberty or property be afforded notice and an opportunity for a hearing held "at a meaningful time and in a meaningful manner" [29] and that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situ-

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[28] The act, itself, provides sufficient notice of its recording requirements, see *Anderson National Bank* v *Luckett*, *supra*, 243, *North Laramie Land Co* v *Hoffman*, 268 US 276, 283; 45 S Ct 491; 69 L Ed 953 (1925), *Grand Rapids Independent Publishing Co* v *Grand Rapids*, 335 Mich 620, 630; 56 NW2d 403 (1953), *Wichelman*, *supra*, 110, *Presbytery of Southeast Iowa* v *Harris*, 226 NW 2d 232 (Iowa, 1975), 58 Am Jur 2d, Notice, § 21, p 503, 66 CJS, Notice, § 13, p 650, but see *Contos* v *Herbst*, 278 NW2d 732 (Minn, 1979). The discussion of notice in this section concerns notice as it relates to an opportunity for a hearing, see *Mullane* v *Central Hanover Bank & Trust Co*, 339 US 306; 70 S Ct 652; 94 L Ed 865 (1950).

[29] *Armstrong* v *Manzo*, 380 US 545, 552; 85 S Ct 1187; 14 L Ed 2d 62 (1965), see, also, *Rockwell* v *Crestwood School Dist Board of Education*, 393 Mich 616, 634; 227 NW2d 736 (1975).

ation".[30] As the scope and extent of the due process protections have been drawn into sharper focus in recent cases concerning the requirement of a pre-deprivation hearing, it has been recognized that the constitutional necessity for such a hearing is determined by balancing the competing interests at stake, see *Arnett* v *Kennedy*, 416 US 134, 212; 94 S Ct 1633; 40 L Ed 2d 15 (1974) (Marshall, J., dissenting with Brennan and Douglas, JJ.), *Rockwell* v *Crestwood School Dist Board of Education*, 393 Mich 616, 634; 227 NW2d 736 (1975). The predominant interests secured by a pre-deprivation hearing are protection against wrongful deprivation and, assuming ultimate vindication of the owner, protection against unnecessary interim damages, see *Rockwell, supra*, 635. When the risks from wrongful deprivation are significant, a pre-deprivation hearing is required in the absence of any countervailing considerations, see *Contos, supra*, 744, *Fuentes* v *Shevin*, 407 US 67, 82; 92 S Ct 1983; 32 L Ed 2d 556 (1972), *Boddie* v *Connecticut*, 401 US 371, 378-379; 91 S Ct 780; 28 L Ed 2d 113 (1971).

However, considering the interests encompassed by this act, the risks of wrongful deprivation are minimal. The act does not deprive owners of productive interests of their property without a hearing[31] but only applies to severed interests which have not been worked, as defined in the act, or recorded for over 20 years. Therefore, since the owner has not been in actual possession of the interest for over 20 years, the risks of financial or other harm from the

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[30] *Cafeteria & Restaurant Workers Union* v *McElroy*, 367 US 886, 895; 81 S Ct 1743; 6 L Ed 2d 1230 (1961), see, also, *Rockwell, supra*.

[31] Compare Minn Stat Ann §§ 93.55, 272.039 which apply to productive as well as nonproductive interests and were held unconstitutional in *Contos* v *Herbst, supra*. See, also, Wis Stat Ann § 700.30.

interim deprivation are minimal.[32] Moreover, a pre-deprivation due process hearing would not necessarily give the owner an opportunity to claim the interest, record it and preserve it[33] but would only address the issue of whether the elements of abandonment had been proven. Balancing the minimal protection afforded by requiring a pre-deprivation hearing against countervailing considerations,[34] the legislative determination not to require a pre-deprivation hearing did not deprive defendants of property without due process of law.

Furthermore, the act does not limit the owner's opportunity for a hearing to determine whether the statutory requirements have been met and to ascertain the ownership of the property.[35] Although a pre-deprivation hearing is

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[32] Although the Supreme Court in *Fuentes* v *Shevin*, 407 US 67, 88-90; 92 S Ct 1983; 32 L Ed 2d 556 (1972), rejected the argument that a prior hearing was required only when "necessities" were involved and quoted from Justice Harlan's concurring opinion in *Sniadach* v *Family Finance Corp of Bay View*, 395 US 337, 342; 89 S Ct 1820; 23 L Ed 2d 349 (1969), that some form of notice and a hearing is required before deprivation of a property interest that "cannot be characterized as *de minimis*", this act applies only to dormant interests which have not been used or recorded for a period of over 20 years and are deemed abandoned. Since the owner has abandoned the property under the statute, those provisions of the act which vest title to the severed interest in the surface owner deprive him of nothing, see *Mullane, supra*. For these reasons we hold that the statute does not deny defendants of their property without due process of law, see *Wichelman, supra*, 110, *Presbytery of Southeast Iowa* v *Harris, supra*, 242, contra, *Wheelock, supra*, 845.

[33] But see, *Wheelock, supra*.

[34] See Bubalo, *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 Ind L R 454, 472-473 (1979).

[35] Compare, Minn Stat Ann § 93.55, *Contos, supra*, 742.

not required, there exists an opportunity for a hearing to be held at a meaningful time. For these reasons, we hold that due process does not require a hearing prior to vesting title in the owner of the surface estate, see *Short, supra,* contra, *Wilson* v *Bishop,* —— Ill 2d ——; —— NE2d —— (1980).

Because the due process guarantees do not require a hearing prior to vesting title in the owner of the surface estate, we do not accept defendant's claim that the absence of any provision in the statute for *notice* of such a hearing renders it constitutionally infirm. The constitutional right to notice of a hearing is implicit in and dependent upon a right to an opportunity for a hearing. No such hearing is provided for or required by the statute; therefore it is not unconstitutional on the basis that it does not have adequate provisions for notice of such a hearing.

VII.

We summarily reject defendants' equal protection claims, US Const, Am XIV, Const 1963, art 1, § 2. The Equal Protection Clause does not require the Legislature to address every aspect of a problem at once or do nothing at all, *O'Donnell* v *State Farm Mutual Automobile Ins Co,* 404 Mich 524, 543; 273 NW2d 829 (1979). Defendants have failed to show that treating oil and gas interests differently from "hard" minerals is arbitrary or lacks a reasonable relation to the object of the legislation, see *Forest* v *Parmalee,* 402 Mich 348; 262 NW2d 653 (1978), *McAvoy* v *H B Sherman Co,* 401 Mich 419, 453-454; 258 NW2d 414 (1977).

We hold that the act is not unconstitutional as applied in these cases. The Court of Appeals decision in *Bickel* is reversed, and in *Van Slooten* is affirmed. Remanded for further proceedings consistent with this opinion.

No costs, this being a public question.

STATE OF MICHIGAN
SUPREME COURT

No. 62256

H. JOHN VAN SLOOTEN, *Plaintiff-Appellee,*

v.

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, devisees, legatees, and assignees of NELLIE F. GILL, deceased,
Defendants-Appellants.

No. 61917

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, a Delaware Corporation, SKELLY OIL COMPANY, a Delaware Corporation, TOTAL LEONARD, INC., a Michigan Corporation, THE DOW CHEMICAL COMPANY, a Delaware Corporation, SAXON OIL COMPANY, a Texas Corporation,
Plaintiffs-Appellants,

v.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corporation, DELORES M. COOK, d/b/a SOUTHWESTERN OIL COMPANY, *Defendants-Appellees.*

BEFORE THE ENTIRE BENCH

LEVIN, J (to reverse *Van Slooten* and affirm *Bickel*)

Our state constitution provides that "[n]o * * * law impairing the obligation of contract shall be enacted." [1] The

[1] Const 1963, art 1, § 10.

United States constitution provides that "[n]o state shall • • • pass any • • • law impairing the obligation of contracts." [2] While deciding these cases under our state Contract Clause, we are counseled by decisions of the United States Supreme Court interpreting the federal clause.

I

Modern construction of the Contract Clause was forged under the pressure of legislative efforts to deal with the Depression. A balancing approach was used, preserving the power of the states to act for the public good while limiting that power in order to implement the purposes of the clause. Thus, in the leading case of *Home Building & Loan Ass'n* v *Blaisdell*,[3] the Court upheld a Minnesota mortgage moratorium law although the law impaired the contractual foreclosure rights of lenders. The Court found five factors critical. First, the legislature had declared, with adequate basis, an emergency need for the moratorium legislation.[4] Second, the law was addressed to the protection of a basic interest of society rather than to the advantage of particular individuals.[5] Third, the relief afforded was tailored to the emergency.[6] Fourth, the legislation was reasonable. In particular, it preserved the integrity of the mortgage indebtedness, provided rental compensation to the mortgagee during the moratorium, and preserved the primary concern of mortgagees—reasonable

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[2] US Const, art I, § 10.

[3] *Home Building & Loan Ass'n* v *Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413; 88 ALR 1841 (1934).

[4] *Id*, pp 444-445.

[5] *Id*, p 445.

[6] *Id*.

protection of their investment security.[7] Finally, the legislation was limited in time to the duration of the emergency.[8]

In a trio of subsequent cases, the failure to closely confine the contractual impairments to what was necessary to implement the state's purpose caused legislation to be found invalid under the Contract Clause. In *W B Worthen Co* v *Thomas*,[9] an Arkansas law exempted life insurance proceeds from collection by the beneficiary's judgment creditors. The Court noted that the exercise of a state's reserved powers "must be limited by reasonable conditions appropriate to the emergency," [10] and found the Contract Clause violated because the law had no limits as to "time, amount, circumstances, or need." [11]

In *W B Worthen Co.* v *Kavanaugh*,[12] an Arkansas law impairing the remedies of mortgage bond holders was found to have destroyed "nearly all the incidents that give attractiveness and value to collateral security." [13] The failure to tailor the amount, necessity and duration of relief to the emergency resulted in a finding of invalidity under the Contract Clause.

Finally, in *Treigle* v *Acme Homestead Ass'n*,[14] the Court emphasized the need for a public purpose behind legisla-

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[7] *Id*, pp 445-447.

[8] *Id*, p 447.

[9] *W B Worthen Co* v *Thomas*, 292 US 426; 54 S Ct 816; 78 L Ed 1344 (1934).

[10] *Id*, p 433.

[11] *Id*, p 434.

[12] *W B Worthen Co* v *Kavanaugh*, 295 US 56; 55 S Ct 555; 79 L Ed 1298 (1935).

[13] *Id*, p 62.

[14] *Treigle* v *Acme Homestead Ass'n*, 297 US 189; 56 S Ct 408; 80 L Ed 575 (1936).

tion impairing contracts. There, a Louisiana law altered the withdrawal rights of members of a building and loan association. The Court found that the law merely altered the rights of members *vis-a-vis* each other, without promoting any public purpose.[15] It was thus invalid under the Contract Clause.

This standard for legislation impairing contracts—that the impairment be on reasonable conditions appropriately tailored to the public purpose giving rise to the legislation —has been further clarified in later decisions. Thus, the existence of an emergency and the temporary nature of the legislation, key elements in *Blaisdell*, are not essential preconditions but are, rather, factors to be used in assessing the reasonableness of the legislative impairment of contracts. *United States Trust Co. of New York* v *New Jersey*;[16] *Veix v Sixth Ward Building & Loan Ass'n.*[17] Other factors include the substantiality of the affected contractual term as an inducement to enter the contract, *El Paso* v *Simmons*;[18] the degree to which the legislation is in responce to circumstances unforeseen at the time of contracting and limits a party to his reasonable expectations, *El Paso, supra;*[19] and whether the altered contractual term

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[15] *Cf., Veix* v *Sixth Ward Building & Loan Ass'n of Newark,* 310 US 32; 60 S Ct 792; 84 L Ed 1061 (1940), holding a similar law valid under the Contract Clause and distinguishing *Treigle* by finding a public purpose in controlling withdrawals that threatened the state's credit system.

[16] *United States Trust Co of New York* v *New Jersey,* 431 US 1, 22-23, fn 19; 97 S Ct 1505; 52 L Ed 2d 92 (1977).

[17] *Veix* v *Sixth Ward Building & Loan Ass'n of Newark,* 310 US 32; 60 S Ct 792; 84 L Ed 1061 (1940).

[18] *El Paso* v *Simmons,* 379 US 497, 514; 85 S Ct 577; 13 L Ed 2d 446 (1965).

[19] *Id,* p 515.

was originally based on a statute when the contract was entered. *Veix, supra.*[20]

II

Turning to the present cases, we recognize that courts normally accord considerable deference to legislative assessments of the reasonableness and necessity of economic and social legislation. However, where such legislation impairs contractual obligations, this deference must be harmonized with the court's duty to apply the constitutional prohibition. In considering the factors outlined above, this Court will follow the lead of the United States Supreme Court in *Allied Structural Steel Co* v *Spannaus,*[21] in keying the degree of deference to the severity of the contractual impairment:

> "The severity of the impairment measures the height of the hurdle the state legislation must clear. Minimal alteration of contractual obligations may end the inquiry at its first stage. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and purpose of the state legislation." [22]

Our first task, therefore, is to assess the severity of the impairment. The Chief Justice limits the impairment to the new obligation to do one of the specified acts or to record a claim of interest every 20 years to preserve the interest. In so doing, she separates the obligation from the consequences of the failure to meet the new obligation, *i.e.,* forfeiture of the interest. This separation we cannot accept. Had the obligation to re-record already been law, and the Legislature acted to change the consequences from

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[20] *Veix, supra,* p 38.

[21] *Allied Structural Steel Co* v *Spannaus,* 438 US 234; 98 S Ct 2716; 57 L Ed 2d 727 (1978), *reh den,* 439 US 886 (1978).

[22] *Id,* p 245.

a small fine to total forfeiture, could we disregard that alteration when challenged under the Contract Clause? We suggest that we could not. Further, the approach of the Chief Justice is inconsistent with that of the United States Supreme Court. For example, in *Home Building & Loan Ass'n* v *Blaisdell*, 290 US 398; 54 S Ct 231; 78 L Ed 413 (1934), the mortgage moratorium legislation did not alter the mortgage *obligation*—the principal was still due and interest thereon continued to accumulate.[23] What was altered was the *consequences* of the failure to meet the mortgage obligation, namely the foreclosure procedure.

When the impairment in the present case is seen as both the obligation and its consequences, the extreme severity of the impairment is clear. The act does not merely modify the owner's interest, it adds a term providing for its extinguishment. It is difficult, if not impossible, to imagine a greater impairment than one which can operate to void the contract entirely.

While it may be true, as the Chief Justice maintains, that the defendants were not substantially induced to obtain their interests in reliance on the fact that their interests need not be re-recorded, other reliance interests are at stake. Defendants identify three such interests. First is "that title to property will not be disturbed in the absence of a competing claim of title or possession," citing *Groesbeck* v *Seeley*.[24] Second is the expectation that if one's title is challenged or threatened, one will have notice of that challenge. Third is the basic reliance interest embodied in the Clause itself—that the state will not act to impair, and certainly not to void, lawful contracts.

It is useful to compare the impairment of these reliance interests with the impairment found to be severe in *Spannaus*. There the Minnesota Private Pension Benefits Pro-

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[23] *Blaisdell, supra*, p 445.

[24] *Groesbeck* v *Seeley*, 13 Mich 329, 343 (1865).

tection Act[25] retroactively imposed vesting and funding requirements on certain employers' pension plans. The Court found the impairment severe because the additional, sudden contribution obligation "impose[d] a completely unexpected liability in potentially disabling amounts."[26]

Here, as in *Spannaus*, the impairment was unexpected, given the reliance interests noted above. Further, the contract here is threatened not merely by potential destruction, as was the pension plan in *Spannaus*, but with the certainty of extinction. The severity of this impairment clearly pushes our inquiry "to a careful examination of the nature and purpose of the state legislation."[27]

The act has the purpose of encouraging development of oil and gas resources by terminating the ownership interests of inaccessible owners—ones who cannot be found—and vesting ownership in the surface owner. The presence of unknown or unlocatable owners precludes contracts for exploration or development of the oil and gas resources.

We recognize the public purpose behind the legislation, and the fact that encouraging energy development promotes a basic interest of society, rather than of a narrow group.[28] However, we are convinced that, given the severity of the impairment and the lack of reasonable conditions appropriately tailoring the impairment to the public purpose, the balance in these cases must be struck on the side of the Constitution.

First, the act needlessly fails to limit its impact to contracts within its rationale. Termination of the interests of inaccessible owners is reasonable and appropriate to its

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[25] Minn Stat Ann §§ 181B.01-181B.17.

[26] *Spannaus, supra*, p 247.

[27] *Id*, p 245.

[28] *Cf., Spannaus, supra*, pp 247-249; *Blaisdell, supra*, p 445.

purposes, but terminating those of owners who can be located by reasonable diligence is not. The act, however, makes no effort to distinguish the two groups.[29] This over-inclusiveness is analogous to the failure to condition mortgage relief upon a showing of necessity in *W B Worthen Co* v *Kavanaugh, supra,* one factor found to distinguish *Kavanaugh* from *Blaisdell.*[30]

Second, the act's purpose can be achieved by measures short of total forfeiture. A statutory royalty rate might be established, and the owner who fails to make the requisite filings may have a mineral lease at that rate imposed upon him with proceeds to be paid into a custodial trust account. As stated in *United States Trust Co.* v *New Jersey, supra,*[31] in the context of weighing the presence of less drastic impairments, "a state is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."

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[29] Nor can the permanent, irrebuttable presumption of abandonment called for in the act be justified. It is the nature of subsurface interests to lie quiet, without apparent activity or assertions of ownership, until cause for exploration arises. Further, the initiative for action normally lies with the development concern, not the owner. The equating of lack of activity on the part of the owner with abandonment is simply not in accordance with common experience, much less "necessarily or universally true." *Vlandis* v *Kline,* 412 US 441, 452; 93 S Ct 2230; 37 L Ed 2d 63 (1973). Since the act purports to deal exclusively in terms of abandonment, this case is "squarely within *Vlandis* [*supra*] as limited by [*Weinberger* v] *Salfi* [422 US 749; 95 S Ct 2457; 45 L Ed 522 (1975)]". *Elkins* v *Moreno,* 435 US 647, 660; 98 S Ct 1338; 55 L Ed 2d 614 (1978).

[30] *W B Worthen Co* v *Kavanaugh, supra,* p 63.
See also *W B Worthen Co* v *Thomas, supra,* p 434.

[31] *United States Trust Co of New York* v *New Jersey,* 431 US 1, 31; 97 S Ct 1505; 52 L Ed 2d 92 (1977).

We wish to emphasize that we are not attempting to confine the Legislature to these alternatives, nor are we expressing any opinion on the constitutionality of these lesser impairments. We simply cannot ignore the striking absence of any effort to protect the owner's interests under the present scheme. No effort to locate the present owner is called for. No process to notify the owner of the threat to his title is provided. No effort is made to preserve the owner's interest in at least the proceeds of the development. It is this failure to condition the impairment to what is reasonable and necessary to achieve the admittedly valid public purpose of the act that renders it an unconstitutional impairment of contract.

III

While, as a general rule, an unconstitutional statute is void *ab initio* [32] and thus contracts based thereon create no rights or obligations, we agree with the statement in *Chicot County Drainage Dist* v *Baxter State Bank* [33] that "an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified."

"The actual existence of a statute, prior to * * * a determination [of unconstitutionality], is an operative fact and may have consequences which cannot be ignored." [34]

Here we deal with a statute enacted 17 years ago. Leases may have been entered and costly exploration and development may have been made in reliance on statutory forfeitures dating back 14 years. Such reliance would have been in direct furtherance of the basic legislative goal—development of energy resources. We feel that such good-

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[32] *Stanton* v *Lloyd Hammond Produce Farms*, 400 Mich 135; 253 NW2d 114 (1977).

[33] *Chicot County Drainage Dist* v *Baxter State Bank*, 308 US 371, 374; 60 S Ct 317; 84 L Ed 329 (1940).

[34] *Id.*

faith reliance on a presumptively valid statute, in furtherance of the legislative goal, should not be upset by rigid application of retrospective invalidity.

Therefore, where a development concern has entered a lease with a surface owner in reliance on a forfeiture under the act, the lessee's rights under the lease should not be voided unless action in reliance on the lease has been minimal. However, future payments under the lease to the surface owner, rather than to the rightful owner of the sub-surface interest, cannot be justified. The rights to past payments will depend upon a balancing of the equities involved. Thus it follows that in *Van Slooten*, where the leases have been executed by the sub-surface owners, the leases should not be upset by the surface owner claiming under the unconstitutional statute.

Where different development concerns have entered competing leases, as in *Bickel*—one with the surface owners and the other with the sub-surface owners—the situation is more difficult. The trial court should assess the equities in light of the differing degrees of action in reliance on the leases and, where the equities are close, give effect to the normal rule of retroactive invalidity.

I would reverse the judgment of the Court of Appeals in *Van Slooten* and affirm in *Bickel*.

APPENDIX B

COURT OF APPEALS OF MICHIGAN

May 22, 1978

Docket No. 77-1225

JOHN E. BICKEL, ETTA MAY BICKEL, GETTY OIL COMPANY, a Delaware Corp., SKELLY OIL COMPANY, a Delaware Corp., TOTAL LEONARD, INC., a Michigan Corp., the DOW CHEMICAL COMPANY, a Delaware Corp. and SAXON OIL COMPANY, a Texas Corp., *Plaintiffs-Appellants,*

v.

JAMES I. FAIRCHILD, WINIFRED FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corp., DOLORES M. COOK, d/b/a SOUTHWESTERN OIL COMPANY,
Defendants-Appellees.

Before V. J. BRENNAN, P.J., and D. E. HOLBROOK and MARTIN, JJ.

R. B. MARTIN, Judge.

The parties agree on the following facts: On August 16, 1944, Isabelle Worth deeded real estate to James and Grace Fairchild, reserving minerals, oils, gases, ores and stone. On February 14, 1956, Isabelle Worth died Carl and Doris Worth are her successors in interest. On April 5, 1971, James and Winifred Fairchild, husband and wife, conveyed to John and Etta Bickel, husband and wife. The grantors here, likewise, reserved minerals, oils, gases, ores and stone.

On January 30, 1973, Carl and Doris Worth granted an oil and gas lease to Shell Oil Company.

On September 4, 1974, the Fairchilds granted an oil and gas lease to Dolores Cook.

On November 1, 1974, the Bickels leased oil and gas rights to Getty Oil Company, Skelly Oil Company, Total Leonard, Inc. and Dow Chemical. Getty Oil and Skelly thereupon assigned part of their interest to Saxon.

Plaintiffs brought suit to quiet title to their oil and gas interests under the Dormant Mineral Act, M.C.L. § 554.291, *et seq.;* M.S.A. § 26.1163(1), *et seq.* The Fairchilds and Dolores Cook, by cross-complaints, asserted their rights against all the others.

The trial court, on motions for summary judgment, found Shell Oil Company was the leasehold owner of all the oil and gas rights in the property. All other claimants were denied any interest. Plaintiffs appeal.

This suit tests the constitutionality of the Dormant Mineral Act. We commence by saying that we need not and do not decide the constitutionality of the prospective provisions of the Act. The statute was 1963 P.A. 42 and became effective September 6, 1963. It provides that any person holding any interest in oil or gas in any land, other than the surface owner, shall be deemed to have abandoned such interest unless during any 20 year period such person relative to the land does one of five things:

(1) Secures a drilling permit, or

(2) actually produces or withdraws gas or oil individually or as part of a pool; or

(3) sells, leases, mortgages or transfers such interest by a recorded instrument; or

(4) uses the property subject to such interests for underground gas storage; or

(5) records a notice of interest with the Register of Deeds.

A three-year grace period was provided by the Act for persons affected to record their notice to preserve their interests.

The parties agreed that Isabelle Worth and her successors did none of the 5 things above for a period of 20 years. The record shows the January 30, 1973, lease to Shell Oil was recorded on February 20, 1973.

We agree with appellants that in our energy short and energy conscious generation, the legislative act has a real public purpose—to encourage exploration and drilling of new gas and oil wells. Some oil and gas rights, with the passage of time, have become fractionalized and distributed among numerous owners, many who are no longer locatable and perhaps even deceased. No oil company will spend the time and expense of tracing all the possible owners down in order to do expensive exploratory drilling with no guarantee of favorable results.

On the other hand, the gas and oil interest holders have a property right given them by private publicly recorded contracts. These rights are subject to being sold, mortgaged, leased, devised or inherited just as the surface rights are. Whose rights are paramount, the state's or the individual's?

A line of cases has discussed the evolution of the doctrine that some impairment of contracts is permissible under the Federal constitution. The basic one is *Home Building & Loan Association v. Blaisdell*, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934). It contained a vigorous 4 vote dissent. The court was confronted with the Minnesota statute giving additional time for redemption from mortgage foreclosure sales during the depression. Such time was given under strict conditions and the statute was to be effective only for a few years.

The majority felt the state reserved the power to protect itself and to act in the best interests of all of its people. This reservation was a part of every contract. The constitutional prohibition of impairment of contract was ". . . not an absolute one and is not to be read with literal exact-

ness like a mathematical formula". Some criteria was used in determining whether the state could impair the obligation of the contract: (1) the Legislature and the state supreme court found a grave emergency existing requiring state help, (2) the impairing statute was to help the basic interest of society and not just a few individuals, (3) the relief granted was appropriate to the need and granted on reasonable conditions, and (4) the legislation was temporary and with a short given limit in time. We note also that the statute gave some added protection to the mortgagees who were the parties being deprived of their right to enforce their original contract.

In *El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965) Texas, by statute, sold land to raise money for schools. The buyers paid very little down and were obligated to pay very little for a long term of years. If the buyers forfeited their rights because they failed to make payments, they were given an unlimited right to redeem by catching up. When oil and gas discoveries and an increasing population made speculation in oil and gas rights a very profitable thing, the statute was amended to require redemption in five years and the only ones given a right of redemption were the last contract vendees. This was upheld by the United States Supreme Court on the basis of *Home Building, supra.* The court believed the statute was "quite clearly necessary" and the measure was a mild one and not too much of a hinderance to the purchaser.

Justice Black dissented. He felt the state could not make a contract under a statute and then by statute repudiate the contract without compensating the injured party. He saw no reason to adopt the balancing principle of *Home Building.*

The United States Supreme Court in *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) found an unconstitutional impairment of contract. There the states of New York and

New Jersey had, by statute, given bond holders certain rights to a port authority's revenues. Twelve years later they repealed that statute. By a 4 to 3 vote the court found it was an unconstitutional impairment of contract. The dissent balanced the rights of the government and the bond holders and found the new statute did no real harm to the bond holders and should be upheld.

Our Court has dealt rather comprehensively with the subject in *Washtenaw Community College Education Association v. Board of Trustees of Washtenaw Community College,* 50 Mich.App. 467, 213 N.W.2d 567 (1973). It accepted the theory of balancing of rights and interests in determining whether a contract could be impaired.

In our particular case, the statute would deprive known property owners of their sub-surface rights without notice, hearing or compensation. The statute was passed in 1963. This was long before any real fossil fuel crisis in this country. By its provisions, it required the Worths to do something affirmatively within three years or lose their property. When the Act became effective as to Isabelle Worth's successors in interest, there was no grave state emergency requiring state help. The Act, at that time, was aimed at helping a few individuals or companies and not all of society. The relief granted could reasonably have required some notice to known interest owners. The relief was not temporary or for a limited time. The property owners' rights were not protected as they were in the statute in *Home Building.*

Our chief concern here is that the Worths were a known, identifiable, suable interest holder. They had, by contract, certain property interests in the land. Those property interests were known to all of the other parties to this litigation. Why should other parties be given the Worths' property interests because the Worths had not used them or filed a notice they still claimed them? Without any grave emergency situation requiring such drastic action, the stat-

ute would take property obtained by contract from the Worths and give it to others. Through the recorded chain of title, the Worths' contractual rights were recognized by the other claimants.

Even in using the "balancing" idea of *Home Building*, we too must balance certain principals. There is a presumption that legislatively enacted statutes are constitutional. There is a presumption that contracts should not be impaired by legislative acts. Balancing cases have had dissents so the weighing of rights and interests has not always been easy.

We agree with the learned trial judge. The effect and application of this Act as to the defendants at bar is prohibited by our state and federal constitutions as a law impairing the obligation of contract.

Affirmed.

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MONTMORENCY

JOHN E. BICKEL, ETTA MAE BICKEL, GERRY OIL COMPANY, a Delaware Corp., SKELLY OIL COMPANY, a Delaware Corp., TOTAL LEONARD, INC., a Michigan Corp., THE DOW CHEMICAL COMPANY, a Delaware Corp., SAXON OIL COMPANY, a Texas Corporation, *Plaintiffs*

vs.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corp., DELORES M. COOK d/b/a SOUTHWESTERN OIL COMPANY, *Defendants*

OPINION OF THE COURT

This action involves a dispute as to the ownership of oil and gas rights in certain lands located in this county.

Plaintiffs claim title by operation of statute, namely; the *Dormant Mineral Act*, 1963 PA 43 (effective September 6); MCLA 554.291 et seq.; MSA 26.1163 et seq.

Defendants claim title by reservation of same, being made their predecessors in title.

Vested title in defendants, or those claiming thereunder, is conceded; plaintiffs' claim is one of superior title by operation of statute, *supra*.

Both parties concede that no factual dispute exists and each has moved for summary judgment to quiet title. Thus, the sole question for determination, requested of this Court, is constitutionality of the Act, *supra*.

The Act in question, *supra*, so far as material, provides that any person holding any interest in oil or gas in any land, other than the surface owner, shall be deemed to have

abandoned them, if during any twenty (20) year period, they, relative to said lands, fail to:

1) Secure a drilling permit; or,

2) Sell, lease, mortgage or transfer (said rights) by recorded instrument, in absence of a drilling permit; or,

3) Actually produce or withdraw gas or oil; or,

4) Actually use such interest in underground gas storage operations; or,

5) Record a notice of interest claimed with the Register of Deeds in the County wherein the land is located.

A three-year grace period was provided by the Act, effective September 3, 1963, for any person so affected to perform any of the above actions and thereby protect their interest from abandonment for another twenty-year period. 1963 PA 43, § 1; MCLA 554.291; MSA 26.1163. In all other respects, the Act, *supra*, provides for retrospective application.

Defendants, who are or claim under the holders of record title as to the subject oil and gas rights, concede they have failed to perform any of the required actions

Further, the Act is self-executing, insomuch as it provides that upon the oil and gas interest being deemed abandoned, it shall vest in the owners of the surface. 1963 PA 43, § 2; MCLA 554.292; MSA 26.1164. It is under this provision that plaintiffs, as owners of the surface or claiming thereunder, base their claim.

Defendants concede that plaintiffs are within the statute but contend the statute is unconstitutional.

Plaintiffs deny defendants' allegation, claiming among other grounds that the statute is a valid exercise of the police power, with means being employed which are appropriate to the ends sought.

It is elementary that historically in this jurisdiction, oil and gas rights constitute a separate legal estate which may, as in this case, be severed and reserved upon conveyance. Thus, the question to be answered is; Has the legislature, by statute and within constitutional propriety, extinguished this severable, but vested right, as to one party and vested same within another party?

This Court has expended exhaustive research, including extensive study of the briefs and arguments of the parties, without reaching satisfactory conclusion. This Court further finds concern relative to a question touching upon the constitutionality of the subject Act, *supra*, which is not raised in the briefs, as filed herein. The pleadings, nevertheless, sufficiently encompass the question that concerns this Court.

In this regard, it concerns this Court that the Act, *supra*, is in derogation of the common law relative to divestiture of property by abandonment.

> "At common law, perfect legal title to a corporeal hereditament cannot be abandoned." CJS, Abandonment, § 5c.

To the extent of this Court's research, it would appear that the universal rule at common law is to the effect that fee simple ownership of minerals in the ground is a corporeal hereditament. Admittedly, a severance, conveyance or contractual transfer, by the fee owner, of the right to go upon land for the taking of oil and gas, has been construed within some jurisdictions as an incorporeal hereditament, and thus subject to abandonment. Neverthless, it would appear that there is precedent in this jurisdiction to sustain the common law rule, *supra*, *Bonninghausen* v *Hansen*, 305 Mich 595; 9 NW2d 856 (1943), and further precedent to sustain that oil and gas leases are corporeal hereditaments, *Attorney General* v *Pere Marquette RR Co*, 263 Mich 431; 248 NW 860 (1933); *Jaenicke* v *Davidson*, 290 Mich 298; 287 NW 472 (1939); 1 Am Jur 2d, Abandoned Property, § 13, 14.

Further, it is well settled that, at common law, in order to establish an abandonment of property, actual acts of relinquishment accompanied by an intention to abandon must be shown, 1 Am Jur 2d, Abandoned Property, § 15, 16; Michigan Law & Practice, Abandonment, § 2, 3. Also, there can be no abandonment of property if the person having the right or the property is unaware of its existence, *Sabins* v *McAllister*, 116 Vt 302; 76 A2d 106; *Linscomb* v *Goodyear Tire & Rubber Co* (CA 8 Mo) 199 F2d 431, and in this jurisdiction, there is long standing authority that abandonment of interests in real estate cannot be inferred from non user alone.[1] *Doty* v *Gillett*, 43 Mich 203; 5 NW 89 (1880).

Thus, the Act, *supra*, contrary to the common law, provides not only that the vested gas and oil interest is now subject to abandonment, when theretofore it was not, but also now requires affirmative acts to avoid abandonment and has eliminated concurrence of the former necessary elements of intent to abandon.

All of the preceding, this Court finds is specifically contrary to and in derogation of the common law in force at the time of the enactment of the Public Act, *supra*. Namely, prior to September 6, 1963, gas and oil interests were not subject to abandonment or, in the alternative, if subject to abandonment, could not be abandoned in absence of actual acts of relinquishment accompanied by an intention to abandon.

This record is barren of any act of abandonment, as recognized at common law or any expression of intention to abandon, being attributable to defendants herein.

In applying the foregoing findings and conclusions to the case at bar, can it be said that the legislature, by

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[1] *Doty* is distinguishable from *Attorney General, supra*, and *Jaenicke, supra*, in that in *Doty*, a leasehold interest is in dispute.

creation of a new criterion of abandonment, can retroactively divest owners of vested gas and oil rights, of their right under common law to hold said interests free of a claim of abandonment or, in the alternative, to hold them free of a claim of abandonment in absence of actual acts of relinquishment accompanied by an intention to abandon. This Court believes not.

Clearly, the Act, *supra,* by retroapplication divests vested property rights, under a criterion of abandonment, that was not in force at time of passage of the Act.

A further clear effect of the Act, *supra,* is to retroactively divest defendants of their right to dispose of property again by application of the criterion of abandonment not theretofore in effect.

> "The right to dispose of property is substantial and valuable. It is incidental to and inheres in the constitutional right to acquire and own property. It may not be impaired or defeated by legislation after the right has vested." *Pfeifer* v *Ableidinger,* 166 Neb 464; 89 NW2d 568, 578 (1958).
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> "Courts, as a rule, are loath to give retroactive effect to statutes, expecially where it will disturb contractual or vested rights." *Nash* v *Robinson,* 226 Mich 146; 197 NW 522 (1924).

This Court concludes that the Legislature by the Act of 1963, *supra,* could not lawfully and constitutionally, retroactively deprive defendants of their common law right to hold oil and gas rights, free of a claim of abandonment or, in the alternative, to deprive them of their common law right to hold same free of a claim of abandonment absent a showing of actual acts of relinquishment accompanied by an intention to abandon.

The effect and application of this Act, *supra*, as to the defendants at bar, is prohibited by the Constitution of this State.

> "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Const 1963, art I, § 10.

This Court makes no finding as to the prospective application of the statute, *supra;* determination of same being unnecessary to reach decision herein.

Plaintiffs argument that constitutional objections should be overcome, for the reasons as set forth in their pleadings and briefs, are rejected.

A Judgment necessary to effectuate this Opinion shall be submitted in accordance with GCR 1963, 522.1.

/s/ Joseph P. Swallow
Joseph P. Swallow, Circuit Judge

Dated: March 1, 1977.

APPENDIX D

FINAL JUDGMENT OF MICHIGAN SUPREME COURT

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN

Held at the Supreme Court Room, in the City of Lansing, in the 23rd day of December in the year of our Lord one thousand nine hundred and eighty.

Present the Honorable MARY S. COLEMAN, Chief Justice, THOMAS GILES KAVANAGH, G. MENNEN WILLIAMS, CHARLES L. LEVIN, JOHN W. FITZGERALD, JAMES L. RYAN, BLAIR MOODY, JR., Associate Justices

SC 61917
CoA 77-1225
LC 75-000877 CH

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, a Delaware Corporation, SKELLY OIL COMPANY, a Delaware Corporation, TOTAL LEONARD, INC., a Michigan Corporation, THE DOW CHEMICAL COMPANY, a Delaware Corporation, SAXON OIL COMPANY, a Texas Corporation,

Plaintiffs-Appellants,

v.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, CARL M. WORTH, DORIS W. WORTH, SHELL OIL COMPANY, a Delaware Corporation, DELORES M. COOK, d/b/a/ SOUTHWESTERN OIL COMPANY,

Defendants-Appellees.

This cause having been brought to this Court by appeal from the decision of the Court of Appeals and having been argued by counsel and due deliberation having been had thereon by the Court, IT IS HEREBY ORDERED that the judgment of the Court of Appeals is REVERSED and the cause is REMANDED to the Circuit Court for the County of Montmorency for further proceedings in conformity with the opinion filed herein. No costs are to be taxed.

APPENDIX E

NOTICE OF APPEAL

STATE OF MICHIGAN SUPREME COURT

No. 62256

H. JOHN VAN SLOOTEN, *Plaintiff-Appellee,*

v.

MYRTLE LARSEN, RUTH ARMSTRONG, MARY KINNISON, ELSIE M. DICK, ALICE C. PEARSON, HELEN WAGNER, MARY HYATT, ELEANOR HALL, FAYE PETRAK, JEAN TENORE, EARL OSBORN, JACK OSBORN, BILL OSBORN, MARVA ENGLE, KENT OSBORN, JAMES OSBORN, SUSAN DECENT, GWENDOLYN GILL, JOYCE A. HALL, LOIS J. BEATTY, JAMES G. DICK, TERREL B. DICK, GERALD A. DICK, VIRGINIA A. CUMMINGS, RONALD G. DICK, GLORIA HENDERSON, LESTER TEATER: unknown claimants, unknown owners; and any and all unknown heirs, devisees, legattees, and assignees of NELLIE F. GILL, deceased,

Defendants-Appellants.

No. 61917

JOHN E. BICKEL, ETTA MAE BICKEL, GETTY OIL COMPANY, a Delaware Corporation, SKELLY OIL COMPANY, a Delaware Corporation, TOTAL LEONARD, INC., a Michigan Corporation, THE DOW CHEMICAL COMPANY, a Delaware Corporation, SAXON OIL COMPANY, a Texas Corporation,

Plaintiffs and Appellants,

v.

JAMES I. FAIRCHILD, WINIFRED E. FAIRCHILD, ISABELLE CRAIG, sole heir-at-law and successor in interest to Carl M. Worth, SHELL OIL COMPANY, a Delaware Corporation, DELORES M. COOK, d/b/a SOUTHWESTERN OIL COMPANY,

Defendants and Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that ISABELLE CRAIG, as sole heir-at-law and successor in interest to CARL M. CRAIG, and SHELL OIL COMPANY, a Delaware corporation, the defendants and appellees in No. 61917 above, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Michigan, reversing the entry of judgment against plaintiffs-appellants, entered in this action on December 23, 1980. This Notice supersedes the Notice of Appeal previously filed with this Court on February 24, 1981.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Date: March 12, 1981

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